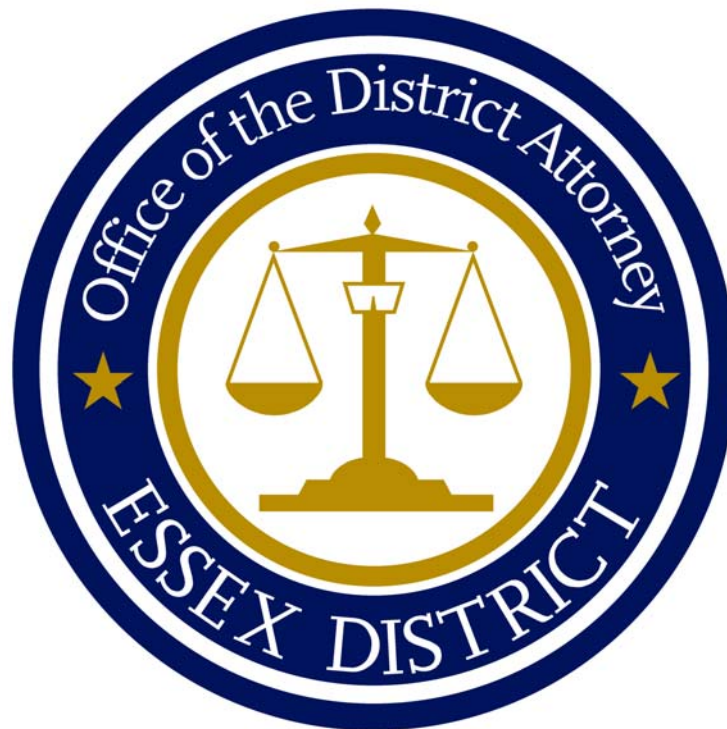


# **OPEN MEETING LAW**



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## **OPEN MEETING LAW IN A NUTSHELL**

**SCOPE:** All meetings of a quorum of any governmental body, board, committee, or subcommittee, however constituted, held to discuss any public policy matter within body's jurisdiction that need a quorum to decide, even if no decisions are made.

**NOTICE:** Filed (not delivered) in clerk's office (and posted) for at least 48 hours, including Saturdays but not including hours on Sundays or legal holidays.

**EMERGENCY:** Meeting on less than 48 hours notice due to an unexpected set of circumstances demanding immediate governmental action to preserve public interest.

**RECORDS:** Minutes of all meetings, including executive sessions and subcommittees, and all documents and data made or received by the governmental body or its members in official capacity. Some records may be "exempt from disclosure" under the state Public Records Law, G.L. chapter 4, section 7, clause 26.

**EXECUTIVE SESSION:** Announcement of purpose and roll call vote in properly convened open session. Approved by majority of body, not of those present. Minutes of executive session must be kept and released as soon as need for secrecy ends.

### **LAWFUL PURPOSES FOR EXECUTIVE SESSION:**

(1) to discuss personal reputation, character, physical condition or mental health, but not professional competence, of an individual, upon notice to individual concerned; no private performance reviews.

(2) to consider discipline, dismissal, or to hear complaints against an individual, upon notice to individual concerned;

(3) to discuss city or town's strategy in collective bargaining or litigation, but not simply to meet with legal counsel; to conduct contract negotiations with nonunion personnel; to conduct collective bargaining or to hear grievances as required by bargaining agreement; quorum may not meet privately with other party to settle litigation.

(4) deployment of security personnel;

(5) to investigate criminal misconduct;

(6) to consider or negotiate real estate transactions if open session may have detrimental effect;

(7) to comply with another law (general privacy);

(8) to consider and interview applicants at preliminary level, if open session may have detrimental effect.

(9) to meet or confer with a certified mediator provided that the decision to participate in mediation is reached in open session, that the parties involved and the purpose of mediation are disclosed before mediation, and that any issues subject to mediation be deliberated in open session after mediation.

## **OVERVIEW OF THE OPEN MEETING LAW**

The notes are intended as an outline of Mass. General Laws, c. 39, §§ 23A and 23B, the Open Meeting Law covering local government. Copies of these statutes and others mentioned in these materials are included after this overview.

Any overview can only enable the reader to recognize the clearest patterns of the law, but it is hoped that in these circumstances, a little knowledge is better than none at all.

The legal research and interpretations underlying these notes are my own, but I trust the conclusions are well-founded.

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### **I. The Basics**

“All meetings of a governmental body shall be open to the public and any person shall be permitted to attend any meeting except as otherwise provided by this section.” G.L. c. 39, sec. 23B, lines 1-3.

“No quorum of a governmental body shall meet in private for the purpose of deciding on or deliberating toward a decision on any matter except as provided by this section.” G.L. c. 39, sec. 23B, lines 4-6. Allowable private meetings are the nine “executive sessions” listed at G.L. c. 39, sec. 23B, lines 17-78.

“A governmental body shall maintain accurate records of its meetings, setting forth the date, time, place, members present or absent, and action taken at each meeting, including executive sessions.” c. 39, s. 23B, line 104.

“The records [minutes] required to be kept ... shall report the names of all members of such boards and commissions present, the subjects acted upon, and shall record exactly the votes and other official actions taken by such boards and commissions; but ... such records need not include a verbatim record of discussions at such meetings.” G.L. c. 66, sec. 5A.

Records of a governmental body include the minutes of all meetings, including executive sessions and subcommittees, and all documents and data made or received by the governmental body or its members in official capacity. Some records may be “exempt from disclosure” under the state Public Records Law, Gen. Laws chapter 4, section 7, clause 26.

Except in an emergency, a notice of every meeting of a governmental body shall be filed with the town or city clerk, and the notice or copy shall be publicly posted for at least forty-eight hours, including Saturdays but not including any hours on Sundays and legal holidays. The notice shall contain date, time and place of meeting. G.L. c. 39, sec. 23B, lines 85-103. Reference to

“second and fourth Tuesdays,” for example, is not notice of the date. Meetings may be cancelled without forty-hours notice and filing with the clerk, but cannot be rescheduled without notice.

Local bodies file notices with city or town clerk and post on clerk’s or other official city or town bulletin board. G.L. c. 39, sec. 23B, lines 86, 89.

Regional or district bodies file with the clerk of each city or town in region or district, for posting at each. Regional or district bodies must also post notice in their own central office. G.L. c. 39, sec. 23B, lines 90-100.

Meetings must be open to the public, and may not be held in places that are inaccessible. Meetings may be inaccessible if held at in a physically inaccessible room, or where those speaking cannot be heard by those exercising the right to be present. Site visits are not meetings open to the public, but site visits may not include business that could be conducted at a meeting. Meetings should not be held in places that may suggest that the public is not welcome, such as private homes or meeting spaces in private businesses or clubs, or far from the community. Meetings should not be held in places too small to accommodate the expected audience. Meetings should not be held at very late hours. Meetings may not be held, except in public emergencies, on Sundays or legal holidays. Meetings may not be held behind locked doors unless someone remains at the door to admit the public.

## **II. The Definitions**

An emergency is “a sudden, generally unexpected occurrence or set of circumstances demanding immediate action.” See Pentecost v. Town of Spencer, 29 Mass. App. Ct. 991 (1990). G.L. c. 39, sec. 23A, lines 6-7.

“Generally unexpected” has been read to rule out “emergencies” which a well-intentioned board could have anticipated and avoided. Overlooked deadlines are not emergencies. Also, the demand for immediate action must be to advance the public interest, not for personal convenience. Scheduling difficulties are not an emergency.

Records/Minutes: At a minimum minutes must include names of members present and absent (demonstrates quorum); date, time, place of meeting (should conform with notice); the “action taken,” i.e. subjects “deliberated,” discussed, or acted upon; votes taken, and other actions taken. While not verbatim records, minutes should be a complete enough statement of action and discussion to reflect the nature of deliberations, and the substance of decisions. Any public participation in a hearing should be memorialized. G.L. c. 66, sec. 5A; G.L. c. 39, sec. 23B, lines 104-105.

Significant procedural decisions should be recorded, such as reasons for an executive session, and the specific legal purpose claimed for the closed sessions. Executive sessions require the public approval of a majority of the committee, not merely a majority of those present and

voting. District Attorney v. Board of Selectmen of Sunderland, 11 Mass. App. Ct. 663 (1981). Those voting to approve the executive session should be recorded.

Minutes of executive session are required, and must meet the same standard. Also, all decisions in executive session must be by recorded roll call votes. Secret ballots are prohibited. Minutes may remain secret “as long as publication may defeat the lawful purposes of the executive session, but no longer.” G.L. c. 39, sec. 23B, lines 104-111. As much detail as can be released must be released; particular details may be withheld if a lawful basis for doing so continues. Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427, 438 (1983). The exceptions to the public records law, G.L. c. 4, sec. 7, clause 26, provide a list of the kinds of matters that might remain private.

“Governmental Body:” Every board, commission, committee or subcommittee - however elected, appointed or otherwise constituted, if authorized by the city or town. G.L. c. 39, sec. 23A. Ad hoc or special committees that include private citizens in addition to “public officials” are governmental bodies, if established by a governmental body. A committee established by a mayor or superintendent of schools to assist that individual is not a governmental body. See Connelly v. School Committee of Hanover, 409 Mass. 232 (1991). A single member of a governmental body is not a subcommittee, even if acting on behalf of the committee. Pearson v. Board of Selectmen of Longmeadow, 49 Mass. App. Ct. 119 (2000).

Meeting; deliberation: (1) Any “corporal convening” and deliberation of a governmental body for which quorum is required in order to make a decision (2) at which any public business or public policy matter over which the governmental body has supervision, control, jurisdiction or advisory power (3) is discussed or considered.

In other words, if the matter discussed involves the body’s public business, and would require a quorum to decide, it may be considered by a quorum only in a lawfully convened meeting. Ch. 39, sec. 23A; sec. 23B, lines 4-6.

“Site visits” are not meetings. G.L. c. 39, sec. 23A.

“Corporal convening” is a gathering of a quorum of members of the governmental body or “corpus,” whether in person or otherwise. G.L. c. 39, sec. 23A. Conducting discussions or exchanging views or comments, among the members of a body, on “” if a quorum is involved in the exchange, whether face to face, by telephone, by “e-mail,” and whether all at once, or by a series of communications intended to be shared with a quorum.

“Deliberation” is a “verbal exchange between a quorum of members of a governmental body attempting to arrive at a decision on any public matter.” G.L. c. 39, sec. 23A. See District Attorney v. Selectmen of Middleborough, 395 Mass. 629 (1985). Interviews and sharing information at a meeting is deliberation. Gerstein v. Superintendent Search Screening Committee, 405 Mass. 465 (1989); Nigro v. Conservation Commission of Canton, 17 Mass. App. Ct. 433 (1984). A decision may be merely a recommendation or report to others who may make

the ultimate decision to act. Nigro v. Conservation Commission of Canton, 17 Mass. App. Ct. 433 (1984).

Discussions after a lawful meeting on the matter usually do not require the involvement of a quorum because the quorum has acted at the meeting. Such discussions are not prohibited, so long as no new matters (those not included in the completed meeting) are raised. See Yaro v. Board of Appeals of Newbury-port, 10 Mass. App. Ct. 587 (1980); J. & C. Homes, Inc. v. Planning Board of Groton, 8 Mass. App. Ct. 123 (1979). Distributing material to be reviewed individually is not deliberation, and may occur without meeting; exchanging views among a quorum about the materials is deliberation, and may occur only at a meeting.

It is not a meeting within meaning of the Open Meeting Law if a gathering is merely a “chance meeting” (i.e., unintentional and unplanned) or “social meeting” (not designed as a business meeting) even though matters relating to official business are discussed, “so long as no final agreement is reached.” G.L. c. 39, sec. 23B, lines 79-81. However, “no chance meeting or social meeting shall be used” to circumvent “the spirit or requirements of” the Open Meeting Law. G.L. c. 39, sec. 23B, lines 81-84.

The chance meeting or social meeting “exception” would be tightly scrutinized. Those meeting have the burden of proving no violation of law occurred. G.L. c. 39, sec. 23B, lines 144-148. It is advisable to disclose at a meeting any official discussions involving a quorum at any unposted “meeting.” Using a lawful meeting to detail such “off-the-record” deliberations is a proper remedy for possible violations. Pearson v. Board of Selectmen of Longmeadow, 49 Mass. App. Ct. 119 (2000); Puglisi v. School Committee of Whitman, 11 Mass. App. Ct. 142 (1981).

Spirit of the Law: the Open Meeting Law is “designed to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based.” Ghiglione v. School Committee of Southbridge, 376 Mass. 70 (1978). It is intended to augment private citizens’ understanding of government’s operations. Hastings and Sons Publishing Co. v. City Treasurer of Lynn, 374 Mass. 812 (1978).

### III. Executive Sessions

The only lawful purposes for holding executive sessions are the nine listed in the statute: these are nearly identical for state, county and local government bodies. Compare G.L. c. 39, s.23B (local) with G.L. c. 34, s. 9G (county) and G.L. c. 30A, s. 11A½ (state).

The governmental body must announce during its open session the legal purpose and reason for any executive session that is proposed. If not detrimental to the purpose of the executive session, the body should identify which employment contract or litigation will be discussed. The decision to enter executive session must be made in open session by roll call vote. The affirmative vote of a majority of the body is required; in other words, a majority of those present is not sufficient, and those present but not voting in effect are votes against executive session. See District Attorney v. Board of Selectmen of Sunderland, 11 Mass. App. Ct. 663

(1981). Before excusing those present and conducting the executive session, the presiding official must announce whether the body will reconvene in open session before adjourning its meeting. G.L. c. 39, sec. 23B, lines 7-18.

Minutes must be kept during the executive session, and must be made public as soon as the need for secrecy that justified the executive session has passed. G.L. c. 39, sec. 23B, lines 104-110. It is possible to make part of the minutes public while continuing to keep secret certain details for which the need for privacy remains. Globe Newspaper Co. v. Boston Retirement Board, 388 Mass. 427, 438 (1983). The exceptions to the public records law, G.L. c. 4, sec. 7, clause 26, provide a list of the kinds of matters that might remain private.

Those employees or officials present during an executive session are bound by law to maintain the secrecy of what occurred until the decision is made to make the record of the executive session public. See G.L. c. 268A, s. 23(c)(2). The body may allow into the executive session any person thought necessary.

Details about each of the specific purposes for executive session are included the summary of case law attached to these materials.

#### IV. **Enforcement**

The Open Meeting Law contains certain statutory procedures for its enforcement, which are supplemented by provisions for enforcing the public records law. Each of these statutes is included in the materials.

Upon receiving a complaint, the local District Attorney's office will determine whether a violation has occurred. In addition, most offices may offer opinions in advance concerning specific procedures that a governmental body may use.

If informal methods of rectifying violations are not expected to succeed, or are inappropriate due to the nature of the violation uncovered, the District Attorney may file a civil action in superior court seeking a declaration of the fact of the violation, and an injunction prohibiting further violations.

In certain circumstances the court can invalidate an action taken in violation of the Open Meeting Law, if the civil action is filed in superior court within twenty-one days of the decision being challenged. G.L. c. 39, sec. 23B, lines 151-154. B.P.O. Elks v. City Council of Lawrence, 403 Mass. 563 (1988). Three registered voters of the municipality involved can proceed by court action without involvement of the District Attorney. G.L. c. 39, sec. 23B, lines 134-135. Entities that are not registered voters have no standing to bring suit to enforce the Open Meeting Law. Vining Disposal Service, Inc. v. Board of Selectmen of Westford, 416 Mass. 35 (1993).

In the first instance, enforcement of the Open Meeting Law depends on the readiness of each member of the governmental body, and those who attend its meetings, to speak up. More

often than not, questions will be resolved on the spot. For more information, study the materials, consult with others, and feel free to contact the local District Attorney's office.

## **V. Public Records Law**

Public Records Requests: minutes of governmental bodies and other records of local government, its bodies, committees, and employees or staff, must be preserved and available for inspection or copying upon request. G.L. c. 4, sec. 7, clause 26; c. 66, secs. 6, 10, 17C. Access or release of records within ten days of a written request usually is adequate to comply with the mandate of "without unreasonable delay," but there is no right to delay release of available records. Globe Newspaper Co. v. Commissioner of Education, 439 Mass. 124 (2003).

Public records law violations may be referred to the Secretary of State's Supervisor of Public Records for a determination, or may be handled informally by the district attorney. See G.L. c. 66, secs. 10 and 17C. A written request for record may be required to initiate enforcement.

Failure to keep minutes is a violation of the Open Meeting Law. G.L. c. 39, sec. 23B, lines 104-107. Where it is determined that the governmental body failed to create minutes of its meetings or its executive sessions, or of its subcommittee meetings, every reasonable step to "recreate" minutes will be required. G.L. c. 66, sec. 17C. See Attorney General v. School Committee of Northampton, 375 Mass. 127 (1978); Foudy v. Amherst-Pelham Regional School Committee, 402 Mass. 179 (1988); Pearson v. Board of Health of Chicopee, 402 Mass. 797 (1988). Unreasonable delay in preparing minutes may be treated as a failure to keep minutes, and a court order to compel record keeping may be sought in superior court under G.L. c. 66, sec. 17C.

Failure to disclose minutes of an executive session after the lawful need for secrecy ends minutes is a violation of the Open Meeting Law. G.L. c. 39, sec. 23B, lines 104-110. A court may order disclosure. G.L. c. 39, sec. 23B, lines 155-158. Failure to release materials discussed by a governmental body at a meeting may violate the access provision of the Open Meeting Law, even if the material may be exempt from disclosure under the Public Records Law if no meeting of a governmental body were involved. See generally, Foudy v. Amherst-Pelham Regional School Committee, 402 Mass. 179 (1988); Attorney General v. School Committee of Northampton, 375 Mass. 127 (1978); Wakefield Teachers Assoc. v. School Committee of Wakefield, 431 Mass. 792 (2000); Perryman v. School Committee of Boston, 17 Mass. App. Ct. 346 (1983); Dupree v. School Committee of Boston, 15 Mass. App. Ct. 535 (1983).

## **VI. Additional Considerations**

**Agendas:** the Open Meeting Law itself does not require governmental bodies to set, publish, maintain, or follow agendas or schedules of business, but use of agendas can advance the goal of open governmental. Those bodies that must publish legal notice of their hearings must follow their published schedules.

**Adjournments:** even well-organized meetings can run longer than planned; if lateness of hour may require that a meeting be adjourned and completed later, the governmental body may resume and complete the same meeting without delay and without posting notice as would be required for another meeting, but this procedure is not allowed except to cover what was planned for the original session of the meeting. If completion of the work of the meeting can be delayed to allow 48 hours notice after posting a “special” or “extra” meeting date, it should be. The posted session would constitute a “meeting upon proper notice” at which the body may take up any item of business, as usual.

**Joint Meetings:** if two or more governmental bodies wish to meet together, each must post timely notice of the meeting; a single notice issued on behalf of each body may be used.

**Site Visits:** although bodies may conduct site visits without posting notice or maintaining public access or keeping minutes, because the Open Meeting Law excludes such visits from its definition of “meeting,” deliberations during site visits are not permitted. Discussion among members of the governmental about decisions concerning what is seen during the site visit may occur only in properly posted meetings.

**Trainings:** sessions conducted to train members of a body on various areas of law or on the basic subject matter or concerns of their official position are not meetings as meeting is defined in the Open Meeting Law. Discussions among a quorum on specific issues or topics that the governmental body will be deciding are deliberations, and may occur only in properly posted meetings.

**Retreats:** sessions conducted strictly for social or training purposes are not meetings, and need not be open to the public, but sessions conducted to help develop or review policies within the jurisdiction of the governmental body involved are deliberations if a quorum is participating, and may occur only in properly posted meetings.

**E-Mail:** communication is regulated by the Open Meeting Law, regardless of new technologies. Thus it is a violation to e-mail to a quorum messages that can be considered invitations to reply in any medium, and would amount to deliberation on business that must occur only at proper meetings. It is not a violation to use e-mail to distribute materials, correspondence, agendas, or reports so that the committee members can prepare individually for upcoming meetings.

## MASSACHUSETTS GENERAL LAWS

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- Right to Address Body at Open Meeting  
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## **General Laws Chapter 39, Section 23A**

### **Definitions.**

**Section 23A.** The following terms as used in sections twenty-three B and twenty-three C shall have the following meanings:-

“Deliberation”, a verbal exchange between a quorum of members of a governmental body attempting to arrive at a decision on any public business within its jurisdiction.

“Emergency”, a sudden, generally unexpected occurrence or set of circumstances demanding immediate action.

“Executive session”, any meeting of a governmental body which is closed to certain persons for deliberation on certain matters.

“Governmental body”, every board, commission, committee or subcommittee of any district, city, region or town, however elected, appointed or otherwise constituted, and the governing board of a local housing, redevelopment or similar authority; provided, however, that this definition shall not include a town meeting.

“Made public”, when the records of an executive session have been approved by the members of the respective governmental body attending such session for release to the public and notice of such approval has been entered in the records of such body.

“Meeting”, any corporal convening and deliberation of a governmental body for which a quorum is required in order to make a decision at which any public business or public policy matter over which the governmental body has supervision, control, jurisdiction or advisory power is discussed or considered; but shall not include any on-site inspection of any project or program.

“Quorum”, a simple majority of a governmental body unless otherwise defined by constitution, charter, rule or law applicable to such governing body.

## **General Laws Chapter 39, Section 23B**

### **Open meetings of governmental bodies.**

**Section 23B.** All meetings of a governmental body shall be open to the public and any person shall be permitted to attend any meeting except as otherwise provided by this section.

No quorum of a governmental body shall meet in private for the purpose of deciding on or deliberating toward a decision on any matter except as provided by this section.

No executive session shall be held until the governmental body has first convened in an open session for which notice has been given, a majority of the members have voted to go into executive session and the vote of each member is recorded on a roll call vote and entered into the minutes, the presiding officer has cited the purpose for an executive session, and the presiding officer has stated before the executive session if the governmental body will reconvene after the executive session.

Nothing except the limitation contained in this section shall be construed to prevent the governmental body from holding an executive session after an open meeting has been convened and a recorded vote has been taken to hold an executive session. Executive sessions may be held only for the following purposes:

- (1) To discuss the reputation, character, physical condition or mental health rather than the professional competence of an individual, provided that the individual involved in such executive session has been notified in writing by the governmental body, at least forty-eight hours prior to the proposed executive session. Notification may be waived upon agreement of the parties. A governmental body shall hold an open meeting if the individual involved requests that the meeting be open. If an executive session is held, such individual shall have the following rights:
  - (a) To be present at such executive session during discussions or considerations which involve that individual.
  - (b) To have counsel or a representative of his own choosing present and attending for the purpose of advising said individual and not for the purpose of active participation in said executive session.
  - (c) To speak in his own behalf.
- (2) To consider the discipline or dismissal of, or to hear complaints or charges brought against, a public officer, employee, staff member, or individual, provided that the individual involved in such executive session pursuant to this clause has been notified in writing by the governmental body at least forty-eight hours prior to the proposed executive session. Notification may be waived upon agreement of the parties. A governmental body shall hold an open meeting if the individual involved requests that the meeting be open. If an executive session is held, such individual shall have the following rights:
  - (a) To be present at such executive session during discussions or consideration which involve that individual.
  - (b) To have counsel or a representative of his own choosing present and attending for the purpose of advising said individual and not for the purpose of active participation.
  - (c) To speak in his own behalf.
- (3) To discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the governmental body, to conduct strategy sessions in preparation for negotiations with

nonunion personnel, to conduct collective bargaining sessions or contract negotiations with nonunion personnel.

- (4) To discuss the deployment of security personnel or devices.
- (5) To investigate charges of criminal misconduct or to discuss the filing of criminal complaints.
- (6) To consider the purchase, exchange, lease or value of real property, if such discussions may have a detrimental effect on the negotiating position of the governmental body and a person, firm or corporation.
- (7) To comply with the provisions of any general or special law or federal grant-in-aid requirements.
- (8) To consider and interview applicants for employment by a preliminary screening committee or a subcommittee appointed by a governmental body if an open meeting will have a detrimental effect in obtaining qualified applicants; provided, however, that this clause shall not apply to any meeting, including meetings of a preliminary screening committee or a subcommittee appointed by a governmental body, to consider and interview applicants who have passed a prior preliminary screening.
- (9) To meet or confer with a mediator, as defined in section twenty-three C of chapter two hundred and thirty-three, with respect to any litigation or decision on any public business within its jurisdiction involving another party, group or body, provided that:  
(a) any decision to participate in mediation shall be made in open session and the parties, issues involved and purpose of the mediation shall be disclosed; and (b) no action shall be taken by any governmental body with respect to those issues which are the subject of the mediation without deliberation and approval for such action at an open meeting after such notice as may be required in this section.

This section shall not apply to any chance meeting, or a social meeting at which matters relating to official business are discussed so long as no final agreement is reached. No chance meeting or social meeting shall be used in circumvention of the spirit or requirements of this section to discuss or act upon a matter over which the governmental body has supervision, control, jurisdiction or advisory power.

Except in an emergency, a notice of every meeting of any governmental body shall be filed with the clerk of the city or town in which the body acts, and the notice or a copy thereof shall, at least forty-eight hours, including Saturdays but not Sundays and legal holidays, prior to such meeting, be publicly posted in the office of such clerk or on the principal official bulletin board of such city or town. The secretary of a regional school district committee shall be considered to be its clerk and he shall file the notice of meetings of the committee with the clerk of each city or town within such district and each such clerk shall post the notice in his office or on the principal official bulletin board of the district. If the meeting shall be of a regional or district governmental body, the officer calling the meeting shall file the notice thereof with the clerk of each city and town within such region or district, and each such clerk shall post the notice in his office or on the principal official bulletin board of the city or town. The notice shall be printed in easily readable type and shall contain the date, time and place of such meeting. Such filing and posting shall be the responsibility of the officer calling such meeting.

A governmental body shall maintain accurate records of its meetings, setting forth the date, time, place, members present or absent and action taken at each meeting, including executive sessions. The records of each meeting shall become a public record and be available to the public; provided, however, that the records of any executive session may remain secret as long as publication may defeat the lawful purposes of the executive session, but no longer. All votes taken in executive sessions shall be recorded roll call votes and shall become a part of the record of said executive sessions. No votes taken in open session shall be by secret ballot.

A meeting of a governmental body may be recorded by any person in attendance by means of a tape recorder or any other means of sonic reproduction or by means of videotape equipment fixed in one or more designated locations determined by the governmental body except when a meeting is held in executive session; provided, that in such recording there is no active interference with the conduct of the meeting.

Upon qualification for the office following an appointment or election to a governmental body, as defined in this section, the member shall be furnished by the city or town clerk with a copy of this section. Each such member shall sign a written acknowledgement that he has been provided with such a copy.

The district attorney of the county in which the violation occurred shall enforce the provisions of this section.

Upon proof of failure by any governmental body or by any member or officer thereof to carry out any of the provisions for public notice or meetings, for holding open meetings, or for maintaining public records thereof, any justice of the supreme judicial court or the superior court sitting within and for the county in which such governmental body acts shall issue an appropriate order requiring such governmental body or member or officer thereof to carry out such provisions at future meetings. Such order may be sought by complaint of three or more registered voters, by the attorney general, or by the district attorney of the county in which the city or town is located. The order of notice on the complaint shall be returnable no later than ten days after the filing thereof and the complaint shall be heard and determined on the return day or on such day thereafter as the court shall fix, having regard to the speediest possible determination of the cause consistent with the rights of the parties; provided, however, that orders with respect to any of the matters referred to in this section may be issued at any time on or after the filing of the complaint without notice when such order is necessary to fulfill the purposes of this section. In the hearing of such complaints the burden shall be on the respondent to show by a preponderance of the evidence that the action complained of in such complaint was in accordance with and authorized by section eleven A ½ of chapter thirty A, by section nine G of chapter thirty-four or by this section. All processes may be issued from the clerk's office in the county in which the action is brought and, except as aforesaid, shall be returnable as the court orders.

Such order may invalidate any action taken at any meeting at which any provision of this section has been violated, provided that such complaint is filed within twenty-one days of the date when such action is made public.

Any such order may also, when appropriate, require the records of any such meeting to be made public, unless it shall have been determined by such justice that the maintenance of secrecy with respect to such records is authorized. The remedy created hereby is not exclusive, but shall be in addition to every other available remedy. Such order may also include reinstatement without loss of compensation, seniority, tenure or other benefits for any employee discharged at a meeting or hearing held in violation of the provision of this section.

Such order may also include a civil fine against the governmental body in an amount no greater than one thousand dollars for each meeting held in violation of this section.

The rights of an individual set forth in this section relative to his appearance before a meeting in an executive or open session, are in addition to the rights that an individual may have from any other source, including, but not limited to, rights under any laws or collective bargaining agreements, and the exercise or nonexercise of the individual rights under this section shall not be construed as a waiver or any rights of the individual.

#### **General Laws Chapter 39, Section 23C.**

##### **Regulation of participation by public in open meetings.**

**Section 23C.** No person shall address a public meeting of a governmental body without permission of the presiding officer at such meeting, and all persons shall, at the request of such presiding officer, be silent. If, after warning from the presiding officer, a person persists in disorderly behavior, said officer may order him to withdraw from the meeting, and, if he does not withdraw, may order a constable or any other person to remove him and confine him in some convenient place until the meeting is adjourned.

#### **General Laws Chapter 39, Section 24.**

##### **Application of chapter [39].**

**Section 24.** The provisions of this chapter shall be in force only so far as they are not inconsistent with the express provisions of any general or special law; and, so far as apt, shall apply to districts as defined in section one A of chapter forty.

#### **General Laws Chapter 66, Section 10.**

##### **Public inspection and copies of records; presumption; exceptions.**

**Section 10.** (a) Every person having custody of any public record, as defined in clause Twenty-sixth of section seven of chapter four, shall, at reasonable times and without unreasonable delay, permit it, or any segregable portion of a record which is an independent public record, to be inspected and examined by any person, under his supervision, and shall furnish one copy thereof upon payment of a reasonable fee. Every person for whom a search of public records is made shall, at the direction of the person having custody of such records, pay the actual expense of such search. The following fees shall apply to any public record in the custody of the state police, the Massachusetts bay transportation authority police or any municipal police department or fire department: for preparing and mailing a motor vehicle accident report, five dollars for not more than six pages and fifty cents for each additional page; for preparing and mailing a fire insurance report, five dollars for not more than six pages plus fifty cents for each additional page; for preparing and mailing crime, incident or miscellaneous reports, one dollar per page; for furnishing any public record, in hand, to a person requesting such records, fifty cents per page. A page shall be defined as one side of an eight and one-half inch by eleven-inch sheet of paper.

(b) A custodian of a public record shall, within ten days following receipt of a request for inspection or copy of a public record, comply with such request. Such request may be delivered in hand to the office of the custodian or mailed via first class mail. If the custodian refuses or fails to comply with such a request, the person making the request may petition the supervisor of records for a determination whether the record requested is public. Upon the determination by the supervisor of records that the record is public, he shall order the custodian of the public record to comply with the person's request. If the custodian refuses or fails to comply with any such order, the supervisor of records may notify the attorney general or the appropriate district attorney thereof who may take whatever measures he deems necessary to insure compliance with the provisions of this section. The administrative remedy provided by this section shall in no way limit the availability of the administrative remedies provided by the commissioner of administration and finance with respect to any officer or employee of any agency, executive office, department or board; nor shall the administrative remedy provided by this section in any way limit the availability of judicial remedies otherwise available to any person requesting a public record. If a custodian of a public record refuses or fails to comply with the request of any person for inspection or copy of a public record or with an administrative order under this section, the supreme judicial or superior court shall have jurisdiction to order compliance.

(c) In any court proceeding pursuant to paragraph (b) there shall be a presumption that the record sought is public, and the burden shall be upon the custodian to prove with specificity the exemption which applies.

(d) The clerk of every city or town shall post, in a conspicuous place in the city or town hall in the vicinity of the clerk's office, a brief printed statement that any citizen may, at his discretion, obtain copies of certain public records from local officials for a fee as provided for in this chapter.

The executive director of the criminal history systems board, the criminal history systems board and its agents, servants, and attorneys including the keeper of the records of the firearms records bureau of said department, or any licensing authority, as defined by chapter one hundred and forty shall not disclose any records divulging or tending to divulge the names and addresses of persons

who own or possess firearms, rifles, shotguns, machine guns and ammunition therefore, as defined in said chapter one hundred and forty and names and addresses of persons licensed to carry and/or possess the same to any person, firm, corporation, entity or agency except criminal justice agencies as defined in chapter six and except to the extent such information relates solely to the person making the request and is necessary to the official interests of the entity making the request.

The home address and home telephone number of law enforcement, judicial, prosecutorial, department of youth services, department of social services, correctional and any other public safety and criminal justice system personnel shall not be public records in the custody of the employers of such personnel and shall not be disclosed; provided, however, that such information may be disclosed to an employee organization under chapter one hundred and fifty E or to a criminal justice agency as defined in section one hundred and sixty-seven of chapter six. The name and home address and telephone number of a family member of any such personnel shall not be public records in the custody of the employers of the foregoing persons and shall not be disclosed. The home address and telephone number, or place of employment or education of victims of adjudicated crimes and of persons providing or training in family planning services and the name and home address and telephone number, or place of employment or education of a family member of any of the foregoing shall not be public records in the custody of a government agency which maintains records identifying such persons as falling within such categories and shall not be disclosed.

## **General Laws Chapter 66, Section 5A.**

### **Records of meetings of boards and commissions; contents.**

**Section 5A.** The records, required to be kept by sections eleven A of chapter thirty A, nine F of chapter thirty-four and twenty-three B of chapter thirty-nine, shall report the names of all members of such boards and commissions present, the subjects acted upon, and shall record exactly the votes and other official actions taken by such boards and commissions; but unless otherwise required by the governor in the case of state boards, commissions and districts, or by the county commissioners in the case of county boards and commissions, or the governing body thereof in the case of a district, or by ordinance or by-law of the city or town, in the case of municipal boards, such records need not include a verbatim record of discussions at such meetings.

## **General Laws Chapter 66, Section 17C.**

### **Failure to maintain public records of meetings; orders to maintain.**

**Section 17C.** Upon proof of failure of a governmental body as defined in section eleven A of chapter thirty A, section nine F of chapter thirty-four and section twenty-three A of chapter thirty-nine, or by any member or officer thereof to carry out any of the provisions prescribed by this chapter for maintaining public records, a justice of the supreme judicial or the superior court sitting within and for the county in which such governmental body acts or, in the case of a governmental body of the commonwealth, sitting within and for any county, shall issue an appropriate order requiring such governmental body or member or officer thereof to carry out the provisions of this chapter. Such order may be sought by complaint of three or more registered voters, by the attorney general, or by the district attorney for the county in which the governmental body acts. The order of notice on the complaint shall be returnable no later than ten days after the filing thereof and the complaint shall be heard and determined on the return day or on such day thereafter as the court shall fix, having regard to the speediest possible determination of the cause consistent with the rights of the parties; provided, however, that orders with respect to any of the matters referred to in this section may be issued at any time on or after the filing of the complaint without notice when such order is necessary to fulfill the purposes of this section. In the hearing of any such complaint the burden shall be on the respondent to show by a preponderance of the evidence that the actions complained of in such complaint were in accordance with and authorized by section eleven B of chapter thirty A, by section nine G of chapter thirty-four or by section twenty-three B of chapter thirty-nine. All processes may be issued from the clerk's office in the county in which the action is brought and, except as aforesaid, shall be returnable as the court orders.

Any such order may also, when appropriate, require the records of any such meeting of a governmental body to be made a public record unless it shall have been determined by such justice that the maintenance of secrecy with respect to such records is authorized by section eleven B of chapter thirty A, by section nine G of chapter thirty-four or by section twenty-three B of chapter thirty-nine. The remedy created hereby is not exclusive, but shall be in addition to every other available remedy.

## **General Laws Chapter 66, Section 6.**

### **Records of public proceedings; preparation; custody.**

**Section 6.** Every department, board, commission or office of the commonwealth or of a county, city or town, for which no clerk is otherwise provided by law, shall designate some person as clerk, who shall enter all its votes, orders and proceedings in books and shall have the custody of such books, and the department, board, commission or office shall designate an employee or employees to have the custody of its other public records. Every sole officer in charge of a department or office of the commonwealth or of a county, city or town having public records in such department or office shall have the custody thereof.

## **General Laws Chapter 66, Section 3.**

### **“Record”, defined; quality of paper and film; microfilm records.**

**Section 3.** The word “record” in this chapter shall mean any written or printed book or paper, or any photograph, micro-photograph, map or plan. All written or printed public records shall be entered or recorded on paper made of linen rags and new cotton clippings, well sized with animal sizing and well finished, or on one hundred per cent bond paper sized with animal glue or gelatin and preference shall be given to paper of American manufacture marked in water line with the name of the manufacturer. All photographs, microphotographs, maps and plans which are public records shall be made of materials approved by the supervisor of records. Public records may be made by handwriting, or by typewriting, or in print, or by the photo-graphic process, or by the microphotographic process, or by any combination of the same. When the photographic or microphotographic process is used, the recording officer, in all instances where the photographic print or micro-photographic film is illegible or indistinct, may make, in addition to said photographic or microphotographic record, a typewritten copy of the instrument, which copy shall be filed in a book kept for the purpose. In every such instance the recording officer shall cause cross references to be made between said photographic or micro-photographic record and said typewritten record. If in the judgment of the recording officer an instrument offered for record is so illegible that a photographic or microphotographic record thereof would not be sufficiently legible, he may, in addition to the making of such record, retain the original in his custody, in which case a photographic or other attested copy thereof shall be given to the person offering the same for record, or to such person as he may designate.

Subject to the provisions of sections one and nine, a recording officer adopting a system which includes the photographic process or the microphotographic process shall thereafter cause all records made by either of said processes to be inspected at least once in every three years, correct any fading or otherwise faulty records and make report of such inspection and correction to the supervisor of records.

## **General Laws Chapter 66, Section 15.**

### **Penalties.**

**Section 15.** Whoever unlawfully keeps in his possession any public record or removes it from the room where it is usually kept, or alters, defaces, mutilates or destroys any public record or violates any provision of this chapter shall be punished by a fine of not less than ten nor more than five hundred dollars, or by imprisonment for not more than one year, or both. Any public officer who refuses or neglects to perform any duty required of him by this chapter shall for each month of such neglect or refusal be punished by a fine of not more than twenty dollars.

## **General Laws Chapter 4, Section 7, Clause 26.**

### **Public Records.**

Twenty-sixth, “Public records” shall mean all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, unless such materials or data fall within the following exemptions in that they are:

- (a) specifically or by necessary implication exempted from disclosure by statute;
- (b) related solely to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary governmental functions requires such withholding;
- (c) personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy;
- (d) inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based;
- (e) notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit;
- (f) investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest;
- (g) trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit;
- (h) proposals and bids to enter into any contract or agreement until the time for the opening of bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases; and inter-agency or intra-agency communications made in connection with an evaluation process for reviewing bids or

proposals, prior to a decision to enter into negotiations with or to award a contract to, a particular person;

(i) appraisals of real property acquired or to be acquired until (1) a final agreement is entered into; or (2) any litigation relative to such appraisal has been terminated; or (3) the time within which to commence such litigation has expired;

(j) the names and addresses of any persons contained in, or referred to in, any applications for any licenses to carry or possess firearms issued pursuant to chapter one hundred and forty or any firearms identification cards issued pursuant to said chapter one hundred and forty and the names and addresses on sales or transfers of any firearms, rifles, shotguns, or machine guns or ammunition therefore, as defined in said chapter one hundred and forty and the names and addresses on said licenses or cards;

*There is no subclause (k).*

(l) questions and answers, scoring keys and sheets and other materials used to develop, administer or score a test, examination or assessment instrument; provided, however, that such materials are intended to be used for another test, examination or assessment instrument;

(m) contracts for hospital or related health care services between (i) any hospital, clinic or other health care facility operated by a unit of state, county or municipal government and (ii) a health maintenance organization arrangement approved under chapter one hundred and seventy-six I, a nonprofit hospital service corporation or medical service corporation organized pursuant to chapter one hundred and seventy-six A and chapter one hundred and seventy-six B, respectively, a health insurance corporation licensed under chapter one hundred and seventy-five or any legal entity that is self insured and provides health care benefits to its employees.

Any person denied access to public records may pursue the remedy provided for in section ten of chapter sixty-six.

## **General Laws Chapter 268A, Section 23.**

### **Supplemental provisions; standards of conduct.**

**Section 23.** (a) In addition to the other provisions of this chapter, and in supplement thereto, standards of conduct, as hereinafter set forth, are hereby established for all state, county, and municipal employees.

(b) No current officer or employee of a state, county or municipal agency shall knowingly, or with reason to know:

(1) accept other employment involving compensation of substantial value, the responsibilities of which are inherently incompatible with the responsibilities of his public office;

(2) use or attempt to use his official position to secure for himself or others unwarranted privileges or exemptions which are of substantial value and which are not properly available to similarly situated individuals;

(3) act in a manner which would cause a reasonable person, having knowledge of the relevant circumstances, to conclude that any person can improperly influence or unduly enjoy his favor in the performance of his official duties, or that he is likely to act or fail to act as a result of kinship, rank, position or undue influence of any party or person. It shall be unreasonable to so conclude if such officer or employee has disclosed in writing to his appointing authority or, if no appointing authority exists, discloses in a manner which is public in nature, the facts which would otherwise lead to such a conclusion.

(c) No current or former officer or employee of a state, county or municipal agency shall knowingly, or with reason to know:

(1) accept employment or engage in any business or professional activity which will require him to disclose confidential information which he has gained by reason of his official position or authority;

(2) improperly disclose materials or data within the exemptions to the definition of public records as defined by section seven of chapter four, and were acquired by him in the course of his official duties nor use such information to further his personal interest.

(d) Any activity specifically exempted from any of the prohibitions in any other section of this chapter shall also be exempt from the provisions of this section. The state ethics commission, established by chapter two hundred and sixty-eight B, shall not enforce the provisions of this section with respect to any such exempted activity.

(e) Where a current employee is found to have violated the provisions of this section, appropriate administrative action as is warranted may also be taken by the appropriate constitutional officer, by the head of a state, county or municipal agency. Nothing in this section shall preclude any such constitutional officer or head of such agency from establishing and enforcing additional standards of conduct.

(f) Upon qualification for office following an appointment or election to a municipal agency, such appointed or elected person shall be furnished by the city or town clerk with a copy of this section. Each such person shall sign a written acknowledgement that he has been provided with such copy.

## **General Laws Chapter 268A, Section 1.**

## **Definitions.**

**Section 1.** In this chapter the following words, unless a different meaning is required by the context or is specifically prescribed, shall have the following meanings:

- (a) “Compensation”, any money, thing of value or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself or another.
- (b) “Competitive bidding”, all bidding, where the same may be prescribed by applicable sections of the General Laws or otherwise, given and tendered to a state, county or municipal agency in response to an open solicitation of bids from the general public by public announcement or public advertising, where the contract is awarded to the lowest responsible bidder.
- (c) “County agency”, any department or office of county government and any division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder.
- (d) “County employee”, a person performing services for or holding an office, position, employment, or membership in a county agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis.
- (e) “Immediate family”, the employee and his spouse, and their parents, children, brothers and sisters.
- (f) “Municipal agency”, any department or office of a city or town government and any council, division, board, bureau, commission, institution, tribunal or other instrumentality thereof or thereunder.
- (g) “Municipal employee,” a person performing services for or holding an office, position, employment or membership in a municipal agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent, or consultant basis, but excluding (1) elected members of a town meeting and (2) members of a charter commission established under Article LXXXIX of the Amendments to the Constitution.
- (h) “Official act”, any decision or action in a particular matter or in the enactment of legislation.
- (i) “Official responsibility”, the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and whether personal or through subordinates, to approve, disapprove or otherwise direct agency action.

(j) “Participate”, participate in agency action or in a particular matter personally and substantially as a state, county or municipal employee, through approval, disapproval, decision, recommendation, the rendering of advice, investigation or otherwise.

(k) “Particular matter”, any judicial or other proceeding, application, submission, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, decision, determination, finding, but excluding enactment of general legislation by the general court and petitions of cities, towns, counties and districts for special laws related to their governmental organizations, powers, duties, finances and property.

(l) “Person who has been selected”, any person who has been nominated or appointed to be a state, county or municipal employee or has been officially informed that he will be so nominated or appointed.

(m) “Special county employee”, a county employee who is performing services or holding an office, position, employment or membership for which no compensation is provided; or who is not an elected official and (1) occupies a position which, by its classification in the county agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the State Ethics Commission and the office of the county commissioners prior to the commencement of any personal or private employment, or (2) in fact does not earn compensation as a county employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special county employee shall be in such a status on days for which he is not compensated as well as on days on which he earns compensation.

(n) “Special municipal employee”, a municipal employee who is not a mayor, a member of the board of aldermen, a member of the city council, or a selectman in a town with a population in excess of ten thousand persons and whose position has been expressly classified by the city council, or board of aldermen if there is no city council, or board of selectmen, as that of a special employee under the terms and provisions of this chapter; provided, however, that a selectman in a town with a population of ten thousand or fewer persons shall be a special municipal employee without being expressly so classified. All employees who hold equivalent offices, positions, employment or membership in the same municipal agency shall have the same classification; provided, however, no municipal employee shall be classified as a “special municipal employee” unless he occupies a position for which no compensation is provided or which, by its classification in the municipal agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, or unless he in fact does not earn compensation as a municipal employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special municipal employee shall be in such status on days for which he is not compensated as well as on days on which he earns compensation. All employees of any city or town wherein no such classification has been

made shall be deemed to be “municipal employees” and shall be subject to all the provisions of this chapter with respect thereto without exception.

(o) “Special state employee”, a state employee:

(1) Who is performing services or holding an office, position, employment or membership for which no compensation is provided, or

(2) Who is not an elected official and

(a) occupies a position which, by its classification in the state agency involved or by the terms of the contract or conditions of employment, permits personal or private employment during normal working hours, provided that disclosure of such classification or permission is filed in writing with the state ethics commission prior to the commencement of any personal or private employment, or

(b) in fact does not earn compensation as a state employee for an aggregate of more than eight hundred hours during the preceding three hundred and sixty-five days. For this purpose compensation by the day shall be considered as equivalent to compensation for seven hours per day. A special state employee shall be in such a status on days for which he is not compensated as well as on days on which he earns compensation.

(p) “State agency”, any department of state government including the executive, legislative or judicial, and all councils thereof and thereunder, and any division, board, bureau, commission, institution, tribunal or other instrumentality within such department, and any independent state authority, district, commission, instrumentality or agency, but not an agency of a county, city or town.

(q) “State employee”, a person performing services for or holding an office, position, employment, or membership in a state agency, whether by election, appointment, contract of hire or engagement, whether serving with or without compensation, on a full, regular, part-time, intermittent or consultant basis, including members of the general court and executive council. No construction contractor nor any of their personnel shall be deemed to be a state employee or special state employee under the provisions of paragraph (l) or this paragraph as a result of participation in the engineering and environmental analysis for major construction projects either as a consultant or part of a consultant group for the commonwealth. Such contractors or personnel may be awarded construction contracts by the commonwealth and may continue with outstanding construction contracts with the commonwealth during the period of such participation; provided, that no such contractor or personnel shall directly or indirectly bid on or be awarded a contract for any construction project if they have participated in the engineering or environmental analysis thereof.



## BASICS OF CASELAW

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BASICS OF CASELAW: DECISIONS OF THE MASSACHUSETTS  
SUPREME JUDICIAL COURT AND APPEALS COURT

PUBLIC HEARING v. PUBLIC MEETING:

1. The Open Meeting Law guarantees access to meetings of governmental bodies, but not the right to address the meeting. The right to speak exists at public hearings. Not every public meeting is a public hearing. The body should make clear to those in attendance whether the session is a hearing or a meeting. At the end of a public hearing, the body is permitted to continue its public meeting to deliberate and decide the matter, and should not allow others to address the body without reopening the hearing. The body may not deliberate in private the matter that was the subject of the public hearing.

Yaro v. Board of Appeals of Newburyport,  
10 Mass. App. Ct. 587 (1980)

ISSUANCE OF WRITTEN DECISIONS:

2. Once a decision is reached in public, it may be put in writing without a meeting, but the process of writing the decision cannot be used to change what was decided at the public meeting. Such a change requires another public meeting.

Yaro v. Board of Appeals of Newburyport,  
10 Mass. App. Ct. 587 (1980)  
J. & C. Homes v. Planning Board of Groton,  
8 Mass. App. Ct. 123 (1979)

RIGHT TO TAPE-RECORD OR VIDEOTAPE MEETINGS:

3. The Open Meeting Law statute grants “any person in attendance” the right to tape record a public session if the governmental body and others who speak are aware that a recording is being made, so long as “there is no active interference with the conduct of the meeting.” In 1987 the law was amended to allow use of videotape recorders placed where governmental body decides.

Wright v. City of Lawrence,  
21 Mass. App. Ct. 343 (1985)  
Commonwealth v. Hyde,  
434 Mass. 594 (2001)

DISCUSSING WITHOUT DECIDING:

4. Deliberation in the sense used by the Open Meeting Law includes “exchanges of views” or “information sharing” or discussions that include a quorum of the governmental body on any matter of its business that only a quorum can decide, even if no votes are taken or decisions are made. The “decision” of what to recommend to the body authorized to “make the decision” is a decision made upon deliberation, and must be reached at a proper meeting.

Gerstein v. Superintendent Search Screening Committee,  
405 Mass. 465 (1989)

Nigro v. Conservation Commission of Canton,  
17 Mass. App. Ct. 433 (1984)

District Attorney v. Board of Selectmen of Middleborough,  
395 Mass. 629 (1985)

#### DECISIONS WITHOUT NEED OF A QUORUM:

5. If a quorum of the governmental body discusses a matter of its business that is merely administrative, such as scheduling or canceling meetings, matters the law allows to be decided without a quorum, there is no deliberation in the strict sense, and no need to discuss such matter at a meeting.

Pearson v. Board of Selectmen of Longmeadow,  
49 Mass. App. Ct. 119 (2000)

Medlock v. Board of Trustees of Univ. of Massachusetts,  
31 Mass. App. Ct. 495 (1991)

#### CLOSED SESSIONS BEFORE PUBLIC MEETINGS:

6. A body does not undo the illegality of deliberating without convening upon proper notice simply by announcing its “private” decisions and affirming them publicly. Private meetings are permitted only for the purposes listed in the statute for executive sessions, and executive sessions can be conducted only after convening in proper public session. The illegal meeting must be followed by a proper meeting where the deliberations are repeated for the public.

Pearson v. Board of Selectmen of Longmeadow,  
49 Mass. App. Ct. 119 (2000)

Pearson v. Board of Health of Chicopee,  
402 Mass. 797 (1988)

District Attorney v. Board of Selectmen of Middleborough,  
395 Mass. 629 (1985)

#### CREATION OF SUBCOMMITTEES:

7. A governmental body that creates a subcommittee or delegates some of its duties or responsibilities to another body of its choosing has created a subcommittee or new governmental body subject to the requirements of the open meeting law. However, if it delegates a duty to one person alone, that person is not a subcommittee. An ad hoc committee created by a school committee is a governmental body; one created by a superintendent, who is not a governmental body, is not. The quorum of a subcommittee is a majority of the subcommittee, not a majority of the full committee.

Pearson v. Board of Selectmen of Longmeadow,  
49 Mass. App. Ct. 119 (2000)

Connelly v. School Committee of Hanover,  
409 Mass. 232 (1991)

Nigro v. Conservation Commission of Canton,  
17 Mass. App. Ct. 433 (1984)

#### NOT ALL COMMITTEES ARE GOV. BODIES:

8. “Whether an authority [committee] serves a public purpose turns on a variety of factors, all having reference to the object sought to be accomplished and to the degree and manner in which that object affects the public welfare.” That members of committee or board are chosen by a governmental body (or by town election) does not compel conclusion that it is a governmental body too. Board that manages a hospital established for the town by private gift is not a governmental body, even if the hospital receives public money. That committee is required by law does not mean it exercises governmental authority in the required sense.

Medlock v. Board of Trustees of Univ. of Massachusetts,  
31 Mass. App. Ct. 495 (1991)

District Attorney v. Board of Leonard Morse Hospital,  
389 Mass. 729 (1983)

#### MINUTES OF EXECUTIVE SESSIONS:

9. Although minutes must be kept during executive sessions, there is no requirement that such closed sessions be taped or that a word for word transcript be prepared.

Perryman v. School Committee of Boston,  
17 Mass. App. Ct. 346 (1983)

#### RELEASING MINUTES OF EXECUTIVE SESSION:

10. The records of any executive session may remain secret as long as release may defeat the purpose of the executive session, but no longer. Sometimes it is proper to release the decision but not the reasons. The governmental body cannot keep minutes secret by agreement that the law says must be released. The burden is on the governmental body to

show the need to keep records private, and cannot act to protect individual privacy without the support of that individual.

Doherty v. School Committee of Boston,  
386 Mass. 643 (1982)

Foudy v. Amherst-Pelham Regional School Committee,  
402 Mass. 179 (1988)

Attorney General v. School Committee of Northampton,  
375 Mass. 127 (1978)

Attorney General v. School Committee of Taunton,  
7 Mass. App. Ct. 226 (1979)

#### PUBLIC RECORDS LAW MAY SEAL PERSONNEL FILES:

11. The written report of disciplinary action prepared by a superintendent of schools may fall within the public records exemption for an employee's personnel file, and may be kept from the public. By contrast, the minutes of an executive session of the school committee on the same subject are subject to the Open Meeting Law's strict limits on continuing secrecy, as outlined in Foudy. Privacy may be temporary.

Worcester Telegram & Gazette v. Chief of Police of Worcester, 58 Mass. App. Ct. 1 (2003)

Wakefield Teachers Assoc. v. School Com. of Wakefield,  
431 Mass. 792 (2000)

Foudy v. Amherst-Pelham Regional School Committee,  
402 Mass. 179 (1988)

Doherty v. School Committee of Boston,  
386 Mass. 643 (1982)

Perryman v. School Committee of Boston,  
17 Mass. App. Ct. 346 (1983)

#### LIMITED RIGHT OF INDIVIDUAL PRIVACY:

12. An individual's statutory right to privacy (G.L. c. 214, sec. 1B), "a right against unreasonable, substantial or serious interference with" privacy, does not permit closing all meetings involving individuals. As the decision process proceeds, reasons for protecting an individual's identity may become less substantial in balance with a public right to open government. Those who receive substantial consideration as a candidate for public position face public disclosure, even if not hired. Those disciplined by a governmental body, or whose job performance is evaluated by a governmental body, may not assert that compliance with the open meeting law is unreasonable.

Attorney General v. School Committee of Northampton,  
375 Mass. 127 (1978)

Gerstein v. Superintendent Search Screening Committee,

405 Mass. 465 (1989)  
Foudy v. Amherst-Pelham Regional School Committee,  
402 Mass. 179 (1988)

#### PROCEDURE FOR EXECUTIVE SESSIONS:

13. The governmental body may call an executive session and close its meeting to the public if (a) it has first convened in an open session for which the required notice has been given, (b) the presiding officer announces the purpose (not merely the statutory exemption) of the executive session, (c) a majority of the members vote by roll call in favor of the proposed session, (d) prior to the closed session, the presiding officer announces whether the body will reconvene in open session, and (e) the vote, purpose, and announcement whether to reconvene are recorded in the open session minutes.

Ghiglione v. School Committee of Southbridge,  
376 Mass. 70 (1978)  
District Attorney v. Board of Selectmen of Sunderland,  
11 Mass. App. Ct. 663 (1981)

#### OBJECTIONS TO PROCEDURES:

14. If no one in attendance objects to the procedure being followed by a governmental body that has decided to go into executive session for a valid purpose, the court will not be required to invalidate the executive session even if a law suit is begun promptly, *i.e.*, within twenty-one days.

Kurlander v. School Committee of Williamstown,  
16 Mass. App. Ct. 350 (1983)

#### PURPOSE 1 - CHARACTER AND PERSONAL PRIVACY:

15. The Open Meeting Law permits, but does not require, a governmental body to meet in executive session when it discusses an individual's personal (not professional) reputation, character, or physical or mental health, but no closed session can be held without written notice to the individual concerned. The individual has the right to be present, with an attorney or other representative, and the personal right to address the session. The individual also has the right to insist on a public, not private session. No executive session can be held in violation of these rights.

Perryman v. School Committee of Boston,  
17 Mass. App. Ct. 346 (1983)  
Puglisi v. School Committee of Whitman,  
11 Mass. App. Ct. 142 (1981)

## PURPOSE 2 - DISCIPLINE AND COMPLAINTS:

16. A governmental body may hear complaints and consider discipline of individual public employees and local officials in executive session, but only after written notice is given to the individual concerned, who has same rights as the individual in purpose 1. The individual concerned has the right to be present during the deliberations on the complaint, and discussion of consequences to be taken. Complaints may be heard privately so that individuals are not harmed by public discussion of unfounded complaints. “Once that purpose evaporates, however, [nondisclosure of unfounded complaints] so does the reason for continued nondisclosure.”

Doherty v. School Committee of Boston,  
386 Mass. 643 (1982)

Foudy v. Amherst-Pelham Regional School Committee,  
402 Mass. 179 (1988)

Perryman v. School Committee of Boston,  
17 Mass. App. Ct. 346 (1983)

O’Sullivan v. Worcester School Committee,  
411 Mass 123 (1991)

## PURPOSE 3 - COLLECTIVE BARGAINING/GRIEVANCES:

17. A governmental body may (and may commit an unfair labor practice if it does not) conduct collective bargaining negotiations and hear grievances under collective bargaining agreements in closed session. The legislature has presumed that open sessions may have a detrimental effect on effective collective bargaining.

Ghiglione v. School Committee of Southbridge,  
376 Mass. 70 (1978)

Marion Bd. of Selectmen v. Labor Relations Commission,  
7 Mass. App. Ct. 360 (1979)

## PURPOSE 3 - PREPARATIONS FOR COLLECTIVE BARGAINING:

18. A governmental body preparing for collective bargaining negotiations may conduct a closed session to discuss strategy, “if an open meeting may have a detrimental effect” on its bargaining position.

Attorney General v. School Committee of Taunton,  
7 Mass. App. Ct. 226 (1979)

## PURPOSE 3 - NEGOTIATIONS WITH NONUNION PERSONNEL:

19. In 1985 and 1988 the Open Meeting Law was amended to allow private sessions “to conduct strategy sessions in preparation for negotiations with nonunion personnel” and to conduct contract negotiations with nonunion personnel. The legislature has presumed that an open meeting may have a detrimental effect on the government’s bargaining position. If there will be no contract negotiation, there can be no strategy session to prepare.

District Attorney v. Board of Selectmen of Sunderland,  
11 Mass. App. Ct. 663 (1981)

Attorney General v. School Committee of Taunton,  
7 Mass. App. Ct. 226 (1979)

#### PURPOSE 3 - BURDEN OF PROOF OF HARM:

20. The governmental body has the burden of proving that an open discussion “reasonably might” have a detrimental effect on its bargaining or litigation position before convening an executive session for such discussions, but the governmental body need not demonstrate “definite harm.”

Attorney General v. School Committee of Taunton,  
7 Mass. App. Ct. 226 (1979)

District Attorney v. Board of Selectmen of Sunderland,  
11 Mass. App. Ct. 663 (1981)

#### PURPOSE 3 - LITIGATION:

21. A governmental body may meet in closed session “to discuss strategy with respect to” litigation “if an open meeting may have a detrimental effect” on its litigating position. The Open Meeting Law imposes strict limits on the right of a governmental body to meet privately with its legal advisors. Litigation is limited to actual pending legal actions and reasonably expected or threatened actions. Meetings with the “opposing party” in litigation cannot be held in executive session, unless falling with purpose 9, mediation, or otherwise directed by the court.

Doherty v. School Committee of Boston,  
386 Mass. 643 (1982)

District Attorney v. Selectmen of Middleborough,  
395 Mass. 629 (1985)

Powers v. Freetown-Lakeville Reg. School Committee,  
392 Mass. 656 (1984)

#### PURPOSE 5 - CRIMINAL INVESTIGATION:

22. Should a governmental body choose to conduct an investigation of possible criminal misconduct, it may (and should) conduct its sessions concerning the investigation privately. The individual who is the subject of such investigation does not have the right of

notification as in purpose 1 or purpose 2, until a disciplinary hearing is undertaken. Prompt coordination with law enforcement is advisable.

#### PURPOSE 6 - REAL ESTATE TRANSACTIONS:

23. There is a recognized need for confidential discussion in negotiations to purchase, exchange, or lease real estate, akin to that involved in collective bargaining. Strategy and actual negotiation may be private until completed “if such discussions may have a detrimental effect.”

Allen v. Selectmen of Belmont,  
58 Mass. App. Ct. 715 (2003)  
District Attorney v. Selectmen of Middleborough,  
395 Mass. 629 (1985)

#### PURPOSE 7 - TO PROTECT PRIVACY REQUIRED BY OTHER LAWS:

24. An executive session may be held in consideration of an individual’s statutory right to privacy only where the public interest in open government is outweighed by an otherwise unwarranted, unreasonable, substantial and serious interference with the individual’s privacy. The individual privacy interest may outweigh the public interest concerning “intimate details” of a “highly personal nature.” See G.L. c. 39, sec. 24, which provides for compliance with express provisions of other statutes.

Attorney General v. School Committee of Northampton,  
375 Mass. 127 (1978)  
Gerstein v. Superintendent Search Screening Committee,  
405 Mass. 465 (1989)

#### PURPOSE 8 - PRELIMINARY SCREENING OF JOB APPLICANTS:

25. Added in 1987, this allows a committee or subcommittee appointed by the governmental body that will make the hiring decision to conduct its preliminary work in closed session, “if an open meeting will have a detrimental effect in obtaining qualified applicants.” Applicants must be asked whether they wish to be considered only in executive session; there is no detrimental effect unless it can be shown that at least one qualified candidate would withdraw if publicly named during preliminary consideration. Once preliminary work has narrowed the field to a group of applicants who will receive substantial consideration, such that the public reasonably would expect open and public consideration of their professional competence, closed meetings are not permitted. Those applicants who have passed preliminary screening, and will be subject to public discussion thereafter, should be notified that they may withdraw without public disclosure. Because the primary privacy interest is protection of an applicant’s current job, preliminary screening may not include contact with a current employer.

Attorney General v. School Committee of Northampton,

375 Mass. 127 (1978)

Gerstein v. Superintendent Search Screening Committee,

405 Mass. 465 (1989)

Connelly v. School Committee of Hanover,

409 Mass. 232 (1991)

#### PRELIMINARY SCREENING PROCEDURES:

26. The preliminary screening committee may “rate and discuss” applicants without keeping a record of individual member positions (but may not vote to narrow list of applicants without recording member opinions). There is no obligation to disclose the names of applicants who do not pass preliminary screening. First interviews may be part of preliminary screening, but background checks with current employers cannot be part of preliminary screening.

Gerstein v. Superintendent Search Screening Committee,

405 Mass. 465 (1989)

#### PURPOSE 9 – MEDIATION SESSIONS:

27. Added in 1994, this ninth provision gives govern-mental bodies express authority to agree to confidential mediation (see G.L. c. 233, sec. 23C) but only if the scope of mediation and decision to agree are established in open session beforehand, and only if action considered in mediation is subject of deliberation by governmental body in open session before such action is taken. The mediation statute requires that any agreement to mediate be made in writing.

#### 21 DAY TIME LIMIT FOR JUDICIAL REMEDIES:

28. The President of the City Council allegedly made series of phone calls to members re their votes at upcoming meeting; the meeting was held two days later in complete compliance with the law, including full deliberations and votes, but without any mention that improper phone calls were made. The time for seeking an order to invalidate the vote taken at the meeting began running when the governmental body voted, not when its alleged violation was discovered.

B.P.O. Elks v. Lawrence City Council,

403 Mass. 563 (1988)

#### OTHER LIMITS ON COURTS:

29. “In order for a court to have authority to nullify an action taken by a public body, the action must be taken while the body was in violation of the statute.” If the governmental body conducts proper, complete public sessions after a violation, and revotes the matter considered at the improper session, the court will not void the original action. By revoting after a proper meeting, the governmental body accomplished what would have been required by the court if its improper action were invalidated. Where the violation is failure to keep proper minutes, the body may be ordered to prepare minutes.

Puglisi v. School Committee of Whitman,  
11 Mass. App. Ct. 142 (1981)

B.P.O. Elks v. Lawrence City Council,  
403 Mass. 563 (1988)

Pearson v. Board of Health of Chicopee,  
402 Mass. 797 (1988)

Pearson v. Board of Selectmen of Longmeadow,  
49 Mass. App. Ct. 119 (2000)

Allen v. Selectmen of Belmont,  
58 Mass. App. Ct. 715 (2003)

#### ATTORNEY’S FEES:

30. The three citizens who complained of serious and flagrant violations were not entitled to attorney’s fees from the governmental body or the state merely because they acted for the public good in place of the “overburdened district attorneys.” However, if the judge finds under G.L. c. 231, sec. 6F that the governmental body’s defense was “wholly insubstantial, frivolous and not advanced in good faith,” fees and expenses may be assessed against the governmental body.

Pearson v. Board of Health of Chicopee,  
402 Mass. 797 (1988)

#### PURPOSE OF OPEN MEETING LAW:

31. “It is essential to a democratic form of government that the public have broad access to the decisions made by its elected officials and to the way in which the decisions are reached.” “The open meeting law is designed to eliminate much of the secrecy surrounding the deliberations and decisions on which public policy is based.” “The people must be able to go beyond and behind the decisions reached and be apprised of the pros and cons involved if they are to make sound judgments on questions of policy and to select their representatives intelligently.”

Foudy v. Amherst-Pelham Regional School Committee,  
402 Mass. 179 (1988)

Ghiglione v. School Committee of Southbridge  
376 Mass. 70 (1978)

Medlock v. Board of Trustees of Univ. of Massachusetts,  
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District Attorney v. Board of Selectmen of Sunderland,  
11 Mass. App. Ct. 663 (1981)

District Attorney v. Selectmen of Middleborough,  
395 Mass. 629 (1985)

Doherty v. School Committee of Boston,  
386 Mass. 643 (1982)

Foudy v. Amherst-Pelham Regional School Committee,  
402 Mass. 179 (1988)

Gerstein v. Superintendent Search Screening Committee,  
405 Mass. 465 (1989)

Ghiglione v. School Committee of Southbridge,  
376 Mass. 70 (1978)

Globe Newspaper Co. v. Commissioner of Education,

439 Mass. 124 (2003)

J. & C. Homes v. Planning Board of Groton,  
8 Mass. App. Ct. 123 (1979)

Kurlander v. School Committee of Williamstown,  
16 Mass. App. Ct. 350 (1983)

Marion Bd. of Selectmen v. Labor Relations Commission,  
7 Mass. App. Ct. 360 (1979)

Medlock v. Board of Trustees of Univ. of Massachusetts,  
31 Mass. App. Ct. 495 (1991)

Nigro v. Conservation Commission of Canton,  
17 Mass. App. Ct. 433 (1984)

O'Sullivan v. Worcester School Committee,  
411 Mass. 123 (1991)

Pearson v. Board of Health of Chicopee,  
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Pearson v. Board of Selectmen of Longmeadow,  
49 Mass. App. Ct. 119 (2000)

Pentecost v. Town of Spencer,  
29 Mass. App. Ct. 991 (1990)

Perryman v. School Committee of Boston,  
17 Mass. App. Ct. 346 (1983)

Powers v. Freetown-Lakeville Reg. School Committee,  
392 Mass. 656 (1984)

Puglisi v. School Committee of Whitman,  
11 Mass. App. Ct. 142 (1981)

Tebo v. Board of Appeals of Shrewsbury,  
22 Mass. App. Ct. 618 (1986)

Vining Disposal Service, Inc. v. Selectmen of Westford,  
416 Mass. 351 (1993)

Wakefield Teachers Assoc. v. School Com. of Wakefield,

431 Mass. 792 (2000)

Worcester Telegram & Gazette v. Chief of Police of  
Worcester, 58 Mass. App. Ct. 1 (2003)

Wright v. City of Lawrence,  
21 Mass. App. Ct. 343 (1985)

Yaro v. Board of Appeals of Newburyport,  
10 Mass. App. Ct. 587 (1980)

INFORMATION NEEDED TO REGISTER  
A COMPLAINT REGARDING THE OPEN MEETING LAW

1. WHO IS YOUR COMPLAINT AGAINST?

- name of board, committee, or government agency
- date, time, place where violation occurred
- purpose of meeting where violation occurred
- person(s) to whom you raised objections

2. WHO IS REGISTERING THIS COMPLAINT?

- your name, address, and daytime phone number
- what, if any, particular group or interest affected by the meeting do you represent?
- are you personally aware of the facts underlying the violation?

3. NATURE OF YOUR COMPLAINT:

- improper notice or posting
- improper executive or closed meeting
- improper emergency meeting
- improper communication between members outside meeting process
- improper communication between any individual and the members
- failure to keep or disclose proper minutes
- other procedural violation at meeting

4. DESCRIBE VIOLATION:

5. DESCRIBE REACTION OF BOARD, COMMITTEE, GOVERNMENT AGENCY, OR ITS ATTORNEY TO YOUR OBJECTION:

6. DATE COMPLAINT DELIVERED TO OFFICE OF THE DISTRICT ATTORNEY, TWO EAST INDIA SQUARE, SALEM, MASS. 01970.

7. FOR FURTHER INFORMATION CONTACT THOMAS DONOVAN, SPECIAL COUNSEL, ESSX DISTRICT ATTORNEY'S OFFICE, IN SALEM AT 978-745-6610.

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